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No. 85-1592.

In the Supreme Court of the United States

OCTOBER TERM, 1985

THOMAS BURKE, ET AL.,
PETITIONER,

v.

MASSACHUSETTS ASSOCIATION OF AFRO-AMERICAN POLICE, INC., ET AL.,
RESPONDENTS.

Brief in Opposition to a Petition for Writ of Certiorari

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Questions Presented for Review

1. Whether petitioners have asserted any interest in the underlying case which would warrant intervention pursuant to Fed. R. Civ. P. 24(a) more than six years after the commencement of the case and over four years after entry of a consent decree resolving all claims raised therein.

2. Whether petitioners' motion to intervene was properly denied as untimely under Fed. R. Civ. P. 24(a).

3. Whether petitioners' interests in the underlying case are adequately represented by the existing parties.

Table of Contents

Questions Presented for Review i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Statutory Provisions 1

Statement of the Case 1

A. The Terms of the Decree 3

Reasons for Denying the Writ 5

A. Petitioners Have Not Asserted Any Interest Which Warrants Intervention Under Fed. R. Civ. P. 24(a) 5

B. Petitioners' Motion To Intervene Was Untimely And Thus Properly Denied 7

(i) Petitioners knew or should have known of their interest long before they sought intervention 7

(ii) The existing parties to the case will be severely prejudiced if intervention was now allowed 7

(iii) Petitioners will suffer no prejudice from the denial of intervention 8

(iv) There are no unusual circumstances militating in favor of intervention 8

(a) The Stotts decision did not limit class-wide, affirmative action relief under Title VII to identifiable victims of discrimination 8

(b) The Stotts decision did not restrict the scope of voluntary affirmative action efforts 13

C. Petitioners Are Adequately Represented By The Existing Parties 15

Conclusion 16

CASES

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 11

Burns v. Sullivan, 619 F.2d 99 (1st Cir.), cert. denied, 449 U.S. 893 (1980) 6

Citizens for a Better Environment v. Gorsuch, 718 F.2d 1117 (D.C. Cir. 1984), cert. denied, 467 U.S. 1219 (1984) 15

Culbreath v. Dukakis, 630 F.2d 15 (1st Cir. 1980) 7, 8

Deveraux v. Geary, 765 F.2d 268 (1st Cir. 1985) 14

Diaz v. American Telephone & Telegraph, 752 F.2d 1356 (9th Cir. 1985) 14

Equal Employment Opportunity Commission v. American Telephone & Telegraph, 556 F.2d 167 (3d Cir. 1977), cert. denied, Communication Workers of America v. Equal Employment Opportunity Commission, 438 U.S. 915 (1978) 11

Equal Employment Opportunity Commission v. Local 638, 753 F.2d 1172 (2d Cir.), cert. granted, ___ U.S. ___, 106 S. Ct. 58 (1985) 5, 8, 14

Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) 4, 5, 8, 9, 12, 13

Franks v. Bowman Transportation Co., 424 U.S. 747 (1976) 11

Garrity v. Gallen, 697 F.2d 452 (1st Cir. 1983) 7

Grann v. City of Madison, 738 F.2d 786 (7th Cir.), cert. denied, ___ U.S. ___, 105 S.Ct. 296 (1984) 14

Hammon v. Barry, 606 F. Supp. 1082 (D.D.C. 1985) 14

Kirkland v. New York State Department of Correctional Service, 711 F.2d 1117 (2d Cir. 1983), cert. denied, Althiser v. New York State Department of Correctional Service, 465 U.S. 1005 (1984) 11

Kromnick v. School District of Philadelphia, 739 F.2d 894 (3d Cir. 1984), cert. denied, ____ U.S. ____, 105 S.Ct. 782 (1985) 14

McCue v. Director of Civil Service, 325 Mass. 605, 91 N.E.2d 761 (1950) 6

Moosehead Sanitary District v. S. G. Philips Corp., 610 F.2d 49 (1st Cir. 1979) 15

National Association for the Advancement of Colored People v. Detroit Police Officers' Association, 591 F. Supp. 1194 (E.D. Mich. 1984) 14

National Association for the Advancement of Colored People v. New York, 413 U.S. 345 (1973) 7

Sansom v. Committee of Lynn, 735 F.2d 1535 (3d Cir. 1984) 15

Setser v. Nocack, Inc., 657 F.2d 962 (8th Cir. 1981) 11

System Federation No. 91 v. Wright, 364 U.S. 642 (1961) 15

Teamsters v. United States, 431 U.S. 324 (1977) 8, 9, 10, 12

Turner v. Orr, 759 F.2d 817 (11th Cir. 1985) 14

United Nuclear Corp. v. Cannon, 696 F.2d 141 (1st Cir. 1982) 15

United Steelworkers of America v. Weber, 443 U.S. 193 (1979) 13, 14, 15

Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir.), cert. granted, ____ U.S. ____, 106 S.Ct. 59 (1985) 5, 8, 14, 15

Williams v. City of New Orleans, 729 F.2d 1554 (5th Cir. 1984) 11

Wygant v. Jackson Board of Education, 746 F.2d 1152 (6th Cir. 1984), cert. granted, ____ U.S. ____, 105 S.Ct. 2015 (1985) 5, 8, 14

STATUTES

42 U.S.C. 1981	2
42 U.S.C. 1983 (1981)	2
42 U.S.C. 1988 (1981)	2
42 U.S.C. 2000(d) (1981)	2
42 U.S.C. 2000(e) (1981)	2
29 C.F.R. § 1607.1 (1985)	3
G.L. c. 31, § 25 (West 1979)	1, 6
G.L. c. 31, § 31 (West 1979)	1

RULES

Supreme Court Rule 17	5
Fed. R. Civ. P. 24	15
Fed. R. Civ. P. 24(a)	7

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Opinions Below

Respondents agree with the identification of the opinions below stated by petitioners, but note that the opinion of the District Court is reported at 106 F.R.D. 80 (D. Mass. 1985).

Statutory Provisions

In addition to the statute identified by petitioners, M.G.L. c. 31, §§ 25 and 31 (West 1979) are relevant to this petition.

Statement of the Case

Petitioners commenced this action on March 2, 1978 against the Boston Police Department (the "Department")

and various State and local officials. The Complaint alleged that defendants had engaged in employment discrimination based on color in promoting police officers to supervisory positions in the Department in violation of, *inter alia*, the Civil Rights Act of 1871, 42 U.S.C. § 1983; the Civil Rights Act of 1870, 42 U.S.C. § 1981; 42 U.S.C. § 1988; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, as amended by the Equal Employment Opportunity Act of 1972; and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d). See Appendix to Respondents' Opposition to Petition for Writ of Certiorari ("Respondents' App.") at 21-45. Commencement of the case attracted significant attention in the local media. Respondents' App. at 74-79.

Defendants' Answers to the Complaint and the terms of the consent decree later entered in the case established that a gross racial imbalance existed in the Department's workforce at the time action was brought.[1]

In 1979, subsequent to the commencement of the suit, the Massachusetts Department of Personnel Administration

[1] As of March 2, 1978, when the action was commenced, approximately 111 (or 5.5%) of the estimated 2,232 sworn officers in the Department were Black. At the same time, the population of the city of Boston was approximately 20% Black. Respondents' App. at 4. Only one (or .45%) of the 222 sergeants in the Department was Black. Two other Blacks held the permanent civil service rank of sergeant and were members of the Command Staff, in positions exempt from Civil Service. Respondents' App. at 10. Of the approximately 50 lieutenants and 25 captains in the Department, there were no Blacks. Respondents' App. at 4. Further, there were no Black officers assigned to the Homicide, General Investigations (robbery), Hackney, or Organized Crime Units. Of the approximately 20 to 30 officers assigned to the Vice Unit, there was only one Black officer. There were no Blacks among approximately 30 detective sergeants and none among approximately eight detective lieutenants. None of the four superintendents in the Department was Black and only two of the deputy superintendents in the Department were Black. There were no Black officers holding provisional promotions at the time the action was commenced. Respondents' App. at 31-32; 51; 60-61; 83.

("DPA"), then a defendant in the case, promulgated a list of police officers who had passed a promotional examination for the position of sergeant conducted by the Department in 1977 (the "1979 Eligibility List"). Respondents' App. at 72. Those police officers on the 1979 Eligibility List thus were eligible for promotion to Sergeant. *Id.* Under Massachusetts civil service law, the 1979 Eligibility List was to expire in 1981. Respondents' App. at 80-82.

Over two years after the action was commenced, the parties reached agreement on a proposed consent decree. Notice of the proposed decree was provided to the plaintiff class and, in addition, to four police officers who had moved to intervene in the case (including three of the petitioners).[2] *See* Petitioners' Appendix ("Petitioners' App.") at 7.

On September 16, 1980, the District Court approved a consent decree entered into by the parties which resolved all of the claims in the case (the "Decree"). Entry of the Decree received considerable publicity. *Id.*; Respondents' App. at 74-79.

A. The Terms of the Decree

The Decree provided that future promotional exams conducted by the Department were to be validated in accordance with the "Uniform Guidelines on Employee Selection Procedures" 29 C.F.R. § 1607.1, *et seq.* (1985) (the "Guidelines") or tests otherwise shown to have no discriminatory impact. The Decree also provided that the Department would promote no more than 25 officers from the then-existing (and non-validated) 1979 Eligibility List. Respondents' App. at 5-6.

Appendix B to the Decree established promotional goals and timetables for promotions to sergeant within the Depart-

[2] On July 9, 1980, their motion to intervene was denied by the District Court, an order from which they did not appeal. Petitioners' App. at 7.

ment. The Decree did not establish any racial quotas, however, stating instead that:

> [t]he parties agree that the obligation of the Department is to make a good faith effort to reach these goals and that these goals have been set in anticipation of having a sufficient number of black officers to be promoted from lists based on validated tests.

Respondents' App. at 13.

Under its original terms, the Decree was to expire five years from the date of its entry. Respondents' App. at 7-8. The first validated exam conducted pursuant to the Decree was not administered until June 1985, however, almost five years after the Decree was entered. On October 31, 1985, therefore, the District Court ordered that the Decree be extended an additional five years. Respondents' App. at 1-2.

During the first four years of the Decree, the Department had made certain temporary "provisional appointments" to sergeant pursuant to Massachusetts civil service law. Respondents' App. at 72; 83. The Decree did not call for any such provisional appointments to be made. Respondents' App. at 3-20.

On July 25, 1984, over six years after the action was commenced and over four years after the entry of the Decree, petitioners moved to intervene in the case in order to vacate the Decree in light of *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984). Respondents' App. at 66-68. The motion was filed prior to the administration of the first validated exam under the Decree and prior to the promotion of any officers — Black or White — pursuant to the Decree. Respondents App. at 1-2.

On May 28, 1985, the District Court denied petitioners' motion to intervene in a Memorandum and Order. 106 F.R.D. at 80. Petitioners appealed to the United States Circuit Court of Appeals for the First Circuit. On December 20, 1985, the Circuit Court affirmed the District Court's Order. 780 F.2d 5 (1st Cir. 1985).

Reasons for Denying the Writ

A. Petitioners Have Not Asserted any Interest Which Warrants Intervention Under Fed. R. Civ. P. 24(a).

Petitioners sought intervention on the grounds that they "had been impaired or impeded in protecting their interest in continued eligibility for promotion by the Consent Decree, particularly in light of the *Stotts* decision, and that they had been prejudiced by the Consent Decree in that the Boston Police Department had appointed acting sergeants to the vacancies which existed rather than having appointed from the 1979 [Eligibility List]". Petition at 5.[3]

Petitioners do not claim that the Decree deprived them of promotions to which they were entitled; nor do they allege that minority officers were promoted ahead of them as a result of the Decree. They simply complain that: (1) the Decree limited the number of persons who *might* have been promoted from the 1979 Eligibility List; and (2) the Department made provisional appointments to sergeant prior to conducting the first promotional exam pursuant to the Decree.

The Decree's limitation on the number of persons the Department could promote from the 1979 Eligibility List did not impair any protectable interest of petitioners, however.

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[3] To the extent the instant Petition seeks guidance from the Court concerning the import of the *Stotts* decision (Petition at 9), the Court's forthcoming decisions in *Wygant v. Jackson Board of Education*, 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, ___ U.S. ___, 105 S.Ct. 2015 (1985); *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479 (6th Cir.), *cert. granted*, ___ U.S. ___, 106 S.Ct. 59 (1985); and *Equal Employment Opportunity Commission v. Local 638*, 753 F.2d 1172 (2d Cir.), *cert. granted*, ___ U.S. ___, 106 S.Ct. 58 (1985) will provide the Court with the opportunity to do so, if appropriate. The interpretation of the *Stotts* decision is therefore not a "special and important" reason for granting the instant Petition. Sup. Ct. R. 17.

Under Massachusetts law, a person whose name has been placed on an eligibility list does not have the right to insist that it retain its place on the list. *McCue v. Director of Civil Service*, 325 Mass. 605, 608, 91 N.E.2d 761, 763 (1950). *Cf. Burns v. Sullivan*, 619 F.2d 99, 104 (1st Cir.), *cert. denied*, 449 U.S. 893 (1980) (qualified nature of expectation of promotion held by person on Massachusetts eligibility list does not rise to the level of constitutionally protected interest). Moreover, even if petitioners did have a protectable interest in ensuring that the 1979 Eligibility List remained in use, the only prejudice which they suffered as a result of the Decree is that they were required to pass a new, validated promotional exam before being certified as eligible for promotion again.

Similarly, the Department's temporary promotions of provisional sergeants did not provide petitioners with any grounds for intervention in that:

1. The Decree did not call for the provisional appointments to be made.

2. The provisional appointments were made in 1983. Respondents' App. at 72. The 1979 List — even absent the entry of the Decree — expired under state law in 1981. Respondents' App. at 80-82.

3. Although under M.G.L. c. 31, § 25 the Administrator of the DPA had the statutory discretion to extend the 1979 List beyond its two year life, petitioners had no legitimate or protectable expectation that, absent the Decree, the Administrator would have exercised that discretion. Respondents' App. at 80-82.

4. Even if the 1979 list was extended, petitioners would not be ensured of a promotion. Indeed, none of them were among the first 25 persons promoted from the List in 1980.

5. Being placed on the 1979 Eligibility List did not vest petitioners with any right to be promoted, *Burns*, 619 F.2d at 104, or any right to retain a place on the List, *McCue*, 325 Mass. at 608, 91 N.E.2d at 763.

B. PETITIONERS' MOTION TO INTERVENE WAS UNTIMELY AND THUS PROPERLY DENIED.

Fed. R. Civ. P. 24(a) requires that motions to intervene must be timely in order to be granted. *See National Association for the Advancement of Colored People v. New York*, 413 U.S. 345, 365 (1973). In order to determine whether a motion to intervene is timely, courts must consider: (1) the length of time the movants knew or reasonably should have known of their interest before seeking to intervene; (2) the prejudice to existing parties caused by the movants' failure to promptly seek intervention; (3) the prejudice to movants if intervention is denied; and (4) unusual circumstances militating for or against intervention. *Garrity v. Gallen*, 697 F.2d 452, 455 (1st Cir. 1983); *Culbreath v. Dukakis*, 630 F.2d 15 (1st Cir. 1980). Petitioners' motion to intervene is untimely under that test.

(i) Petitioners knew or should have known of their interest long before they sought intervention

All of the petitioners have been employed by the Department since at least 1977. Respondents' App. at 72. (Indeed, three of the petitioners sought to intervene in 1980 and did not appeal the denial of that motion. Petitioners' App. at 7). The institution of the action and the proposed settlement received extensive local media coverage. Respondents' App. at 74-79.

Petitioners thus surely knew of, or should have known of, their asserted interest in this case years before their motion to intervene was filed in July of 1984. *Cf. Garrity*, 697 F.2d at 476.

(ii) The existing parties to the case will be severely prejudiced if intervention was now allowed

To allow petitioners to intervene after delaying so long to assert their interests would deny the relief sought by plain-

tiffs and agreed to by defendants; force the defendants to expend additional public funds to defend the claims of plaintiffs and petitioners; waste judicial resources; and destroy a voluntary resolution of this dispute, forcing a trial on the merits. The severe prejudice to the existing parties thus militates against intervention. *Cf. Culbreath*, 630 F.2d at 21-22.

(iii) Petitioners will suffer no prejudice from the denial of intervention

As demonstrated in section A, *supra*, petitioners have not asserted any interest which warrants intervention. Unlike the parties in other post-*Stotts* cases such as *Wygant v. Jackson Board of Education*, 746 F.2d 1152 (6th Cir. 1984), *cert. granted*, ____ U.S. ____, 105 S.Ct. 2015 (1985); *Equal Employment Opportunity Commission v. Local 638*, 753 F.2d 1172 (2d Cir.), *cert. granted*, ____ U.S. ____, 106 S.Ct. 58 (1985); and *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479 (6th Cir.), *cert. granted*, ____ U.S. ____, 106 S.Ct. 59 (1985) petitioners have not asserted that the Decree resulted in a minority officer being promoted to sergeant ahead of any of the petitioners. Denial of intervention thus does not prejudice any even arguably protected interests of petitioners.

(iv) There Are No Unusual Circumstances Militating in Favor of Intervention.

This Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984) is not an unusual circumstance which militates in favor of intervention. In fact, the *Stotts* case is irrelevant to petitioners' claims.

(a) The Stotts decision did not limit class-wide, prospective affirmative action relief under Title VII to indentifiable victims of discrimination

In *Teamsters v. United States*, 431 U.S. 324 (1977), this Court drew a sharp distinction between the evidentiary bur-

dens which must be met under Title VII to warrant an award of prospective affirmative action relief and the stricter burdens which must be met to warrant an award of retroactive, make-whole relief, such as a grant of retroactive seniority. The *Teamsters* Court stated that prospective class-wide relief could be granted on the basis of an unrebutted *prima facie* Title VII violation, but further held that individual awards of retroactive seniority could be made only to identifiable victims of discrimination. *Id.* at 330 n.4, 361-62 & n. 47. The *Stotts* Court did no more than reaffirm the *Teamsters* holding and, accordingly, the decision does not affect the propriety under Title VII of the prospective, class-wide relief challenged by petitioners.

In *Teamsters*, the United States brought suit under Title VII against an employer and a union for engaging in a pattern and practice of discrimination and sought: (1) a general injunctive remedy and (2) specific "make-whole" relief for all individual discriminatees in the form of retroactive seniority. *Id.* at 330.

Prior to the trial court's decision, the parties entered a partial consent decree which provided, *inter alia*, that minorities and whites would be hired on a one-to-one basis until the percentage of minority workers equaled the percentage of minority members in the surrounding metropolitan area. 431 U.S. at 330 n.4. The remaining issues were then tried before the district court which found that the defendants had engaged in a pattern and practice of discrimination. *Id.* at 331. On appeal, the Fifth Circuit expanded the relief granted by the district court and granted retroactive seniority to all minority employees of the defendant, regardless of whether they were actual victims of discrimination. *Id.* at 333.

The Supreme Court affirmed the lower courts' findings of a pattern and practice of discrimination, *id.* at 337, but further held that individual, "make-whole relief" in the form of retroactive seniority could be granted only to actual victims

of discrimination. In so ruling, the Court expressly contrasted the need for identifying actual victims when awarding retroactive seniority relief from situations where prospective, injunctive relief (such as an affirmative action order) is involved.

> If an employer fails to rebut the inference that arises from the Government's prima facie case, a trial court may then conclude that a violation has occurred and determine the appropriate remedy. *Without any further evidence from the Government, a court's finding of a pattern or practice justifies an award of prospective relief.* Such relief might take the form of an injunctive order against continuation of the discriminatory practice, an order that the employer keep records of its future employment decisions and file periodic reports with the Court, or any other order "necessary to ensure the full employment of the rights" protected by the Title.

Id. at 361 (emphasis added). The *Teamsters* Court stated that the parties' partial consent decree (which instituted a racial quota system that benefited unproven victims of discrimination) constituted such *prospective* relief in the case before it. *Id.* at 330 n.4 and at 361 n.47.

While the affirmative action plan contained in the partial decree could be ordered without regard to the identities of proven victims of discrimination, the *Teamsters* Court held that the individual relief sought by the plaintiffs in the form of retroactive seniority could only be extended to identified victims of discrimination.

> When the government seeks individual relief for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief . . . [In order to obtain such individual relief], [t]he Government need only show that an alleged individual discriminatee unsuccessfully applied for a job and was therefore a potential victim of the proved discrimination.

Id. at 361-2. *Cf. Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976) (Section 703(h) does not prohibit make-whole relief in the form of retroactive seniority awards to actual victims of discrimination.)[4]

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[4] Petitioners argue that the Decree is invalid because it contains no admissions of liability on the part of the defendants. Petition at 8. That argument is based in part upon a misinterpretation of the last sentence of section 706(g) of Title VII which provides:

> [n]o order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of § 2000e-3(a) of the title.

Contrary to the petitioners' position, however, that sentence has in the past been interpreted as merely preserving the employer's defense that his challenged conduct was for a cause other than discrimination and not at all as addressing the scope of class relief available under the Act. *See Equal Employment Opportunity Commission v. American Telephone and Telegraph Co.*, 556 F.2d 167, 176, 177 (3d Cir. 1977), *cert. denied, Communications Workers of America v. Equal Employment Opportunity Commission*, 438 U.S. 915 (1978); *Williams v. City of New Orleans*, 729 F.2d 1554, 1557 (5th Cir. 1984). Moreover, the gross disparity in the Department's racial composition, stipulated to by the parties by the terms of the Consent Decree and by the defendants' Answers to plaintiff's Complaint (*see* n.1 *supra*) establish a *prima facie* Title VII violation sufficient to provide the basis for relief under the Act. *Kirkland v. New York State Department of Correctional Services*, 711 F.2d 1117, 1128-32 (2d Cir. 1983), *cert. denied, Althiser v. New York State Department of Correctional Service*, 465 U.S. 1005 (1984); *Setser v. Novak, Inc.*, 657 F.2d 962, 968 (8th Cir. 1981). Indeed, in cases where such a *prima facie* case is unrebutted by a showing such that the contested practices are job-related, a court is required to enter a decree finding unlawful discrimination. *Kirkland*, 711 F.2d at 1130, citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). Thus, petitioners' claim that the Decree lacks sufficient factual findings to support relief under Title VII has no basis in law or fact.

Against the necessary backdrop of the *Teamsters* decision, the narrow holding of the *Stotts* decision is clear. The respondent in *Stotts* was a firefighter from the Memphis Fire Department who filed a class action in 1977 alleging that the Department had engaged in a pattern or practice of discrimination on the basis of race in violation of Title VII and 42 U.S.C. Sections 1981 and 1983. Subsequently, a consent decree was entered pursuant to which the City agreed to an interim hiring goal of filling 50% of the job vacancies in the Fire Department with qualified black applicants. 467 U.S. at 565-66.

In May of 1981, because of projected budget deficits, the Fire Department began a series of layoffs based on a "last hired, first fired" rule, pursuant to the firefighters' seniority system. Of the approximately 40 employees in the Fire Department laid off, 15 were Black. *Id.* at 566-67.

The district court, over the objection of the City, granted an injunction against the seniority-based layoffs finding that they would have a racially discriminatory effect and that the seniority system was not bona fide under Title VII. *Id.* at 567. The effect of the injunction thus was to retroactively grant to new minority hires the seniority rights which employees with longer periods of employment enjoyed under the collective bargaining agreement.

On appeal, the Sixth Circuit held that the district court's conclusion that the City's seniority system was not bona fide was in error. Nevertheless, the Circuit Court concluded that seniority-based layoffs would violate the terms of the consent decree by reducing the percentage of minorities in the Fire Department. Alternatively, the Court held that the district court was empowered to modify the seniority system despite the system's immunization from attack under Section 703(h) of the Title VII. *Id.* at 568.

This Court reversed. At the outset, this Court rejected the Sixth Circuit's conclusion that the modification merely enforced the provisions of the consent decree, and noted that

there was no suggestion within the four corners of the decree of any intention to depart from the existing seniority system. *Id.* at 574-76.

The *Stotts* Court then considered, and rejected, the Circuit Court's conclusion that the district court's ruling was proper even if it conflicted with the seniority system. Because the district court's order constituted a retroactive award of seniority which, according to *Teamsters*, could be made under Title VII only to actual victims of discrimination, the *Stotts* Court held that the order was beyond the scope of the district court's remedial authority under Title VII. *Id.* at 577-79. Nowhere in the decision did the *Stotts* Court address the requirements (earlier set forth in *Teamsters*) for granting prospective, class-wide affirmative action relief under Title VII. Because that is precisely the relief afforded by the consent decree here, the holding in *Stotts* does not impose any requirement that the Decree benefit only identifiable victims of discrimination.

(b) The Stotts Decision did not restrict the scope of voluntary affirmative action efforts

Since this Court's decision in *United Steelworkers of America v. Weber*, 443 U.S. 193 (1970), it has been clear that the beneficiaries of voluntary affirmative action efforts may be members of a disadvantaged minority class and need not be proven victims of discrimination. The *Stotts* decision did not upset the Court's decision in *Weber*. Under *Weber*, the class-wide prospective affirmative action relief voluntarily agreed to by the parties to the decree clearly is consistent with Title VII.

The issue in *Weber* was whether employers were free under Title VII to take voluntary race-conscious steps to eliminate manifest racial imbalances in traditionally segregated job categories. *Id.* at 197. This Court held that although an

employer perhaps may not be *required* to engage in affirmative action to correct *de facto* racial imbalances in its work forces, Title VII *permits* employers to undertake voluntary affirmative efforts to correct such imbalances, even in cases (such as *Weber*) where there have been no prior judicial determinations that the employer has previously discriminated against the beneficiaries of the affirmative action. The *Weber* Court held that an employer's voluntary attempts to "eliminate conspicuous racial imbalance in traditionally segregated job categories" was thus permissible under Title VII, *id.* at 209, notwithstanding the absence of any findings of intentional discrimination or identification of actual victims of such discrimination.

In a concurring opinion, Justice Blackmun stated that, under the opinion of the Court, an individual employer need not have engaged in discriminatory practices in the past in order to properly institute an affirmative action plan; rather, a statistical disparity in "traditionally segregated job categories" would suffice to warrant voluntary affirmative action. *Id.* at 213. Clearly, under such a view a finding of actual discrimination is not a prerequisite to affirmative action efforts under Title VII. Every federal court which has considered the issue subsequent to the *Stotts* decision has so concluded.[5]

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[5] *See Local 638*, 753 F.2d at 1186 (2d Cir.), *cert. granted*, ___ U.S. ___, 106 S.Ct. 58 (1985); *Vanguards*, 753 F.2d 479, 486 (6th Cir.), *cert. granted*, ___ U.S. ___, 106 S.Ct. 59 (1985); *Diaz v. American Telephone & Telegraph,*, 752 F.2d 1356, 1360 n.5 (9th Cir. 1985); *Wygant*, 746 F.2d 1157-58 (6th Cir. 1984), *cert. granted*, ___ U.S. ___, 105 S.Ct. 2015 (1985); *Kromnick v. School District of Philadelphia*, 739 F.2d 894, 911 (3d Cir. 1983), *cert. denied*, ___ U.S. ___, 105 S.Ct. 782 (1985); *Grann v. City of Madison*, 738 F.2d 786, 795 n.5 (7th Cir.), *cert. denied*, ___ U.S. ___, 105 S.Ct. 296 (1984); *Hammon v. Barry*, 606 F. Supp. 1082, 1095 (D.D.C. 1985); *Turner v. Orr*, 759 F.2d 817, 823-26 (11th Cir. 1985); *National Association for the Advancement of Colored People v. Detroit Police Officers Association*, 591 F. Supp. 1194, 1202-03 (E.D. Mich. 1984). *See also, Devereaux v. Geary*, 765 F.2d 268 (1st Cir. 1985).

Petitioners argue that because the defendants' voluntary affirmative action efforts are embodied in a consent decree entered as an order of the district court, they are prohibited by Title VII, depite the holding of *Weber*. *Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479 (6th Cir.), *cert. granted*, ____ U.S. ____, 106 S. Ct. 59 (1985) holds directly to the contrary. *See also, Sansom Committee v. Lynn*. 735 F.2d 1535, 1538 (3d Cir. 1984) ("Consent decrees need not be limited to the relief that a court could provide on the merits"); *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1118, 1125 (D.C. Cir. 1984), *cert. denied*, 467 U.S. 1219 (1984) (consent decree may afford relief not authorized by underlying statute). *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961) is not to the contrary. The *Wright* Court merely held that a decree may not afford relief which is patently inconsistent with a substantive policy of the underlying statute. Given the holding of *Weber*, it is impossible to maintain that such is the case here.

C. Petitioners Are Adequately Represented by the Existing Parties.

Under Fed. R. Civ. P. 24, a prospective intervenor must demonstrate that the existing parties do not adequately represent its interests before being allowed to intervene. Moreover, a would-be intervenor faces a presumption of adequacy when it has the same ultimate goal as a party. *Moosehead Sanitary District v. S. G. Philips, Corp.*, 610 F.2d 49, 54 (1st Cir. 1979); *United Nuclear Corporation v. Cannon*, 696 F. 2d 141, 144 (1st Cir. 1982). To overcome that presumption, the applicant must demonstrate adversity of interest, collusion or nonfeasance. *Id.*

The petitioners have the same goal as the defendants in this action originally had: upholding the validity of the Department's former promotional practices. Indeed, in their Motion

to Intervene, the petitioners adopted the answer of the defendant Boston Police Department. Respondents' App. at 66. In order to overcome the presumption that their interests were adequately represented by the defendants, petitioners were required to demonstrate adversity of interests, collusion or nonfeasance. No such showing was made, and the Motion to Invervene was therefore properly denied.

Conclusion

For each and all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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